

Schena, Cristeen

From: McDonnell, Ida
Sent: Tuesday, August 19, 2014 4:09 PM
To: Dahl, Donald
Subject: FW: Follow up on 5/22/14 Cape with Audra Parker

Donald,

Can you draft something and run it by Jill and I will send it - again

Ida E. McDonnell, Manager
Air Permits, Toxics and Indoor Programs Unit
EPA-New England, Region 1
5 Post Office Square
Boston, MA 02109-3912
Phone 617-918-1653
Fax 617-918-0653

From: Sandy Taylor [mailto:sandyt@saveoursound.org]
Sent: Tuesday, August 19, 2014 10:20 AM
To: McDonnell, Ida
Subject: RE: Follow up on 5/22/14 Cape with Audra Parker

Ida:
Thank you for your response to our questions, sorry for the delay getting back to you.

We would like to inquire if any permit has been issued and if there are any documents/correspondence with Cape Wind or with any parties outside of EPA on this permit renewal are available for you to send to us?

Again, thank you for response.
Sandy

Sandy Taylor
Executive Assistant
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Hyannis, MA 02601
508-775-9767
508-775-9725 (f)
sandyt@saveoursound.org
www.saveoursound.org

From: McDonnell, Ida [mailto:McDonnell.Ida@epa.gov]
Sent: Wednesday, August 13, 2014 1:31 PM
To: Sandy Taylor
Subject: RE: Follow up on 5/22/14 Cape with Audra Parker

Hi Sandy,

I have the following responses to your questions below:

1. What is the status of EPA's review of Cape Wind's extension request?

EPA is currently reviewing the Cape Wind Associates request made on March 7, 2014 to extend the end date of the Phase I construction period from September 30, 2015 to September 30, 2017

2. What is the status on of Cape Wind request, timeline and process?

EPA will either grant or deny, via a letter, the request to increase the Phase I construction period in accordance with Conditions XI.A.1-4 of the Outer Continental Shelf Air Permit OCS-R1-01. At this time we have not established a firm response date to Cape Wind Associates request. With the recent resolution of the outstanding issues involving consultation under the Endangered Species Act, my staff will now focus on reviewing all other pertinent information regarding extending the end date for the Phase I construction period. I have attached to this e-mail our letter dated August 12, 2014 to the Bureau of Ocean Energy Management. Once we have come to a decision, our response letter regarding the extension request will be signed by the Regional Administrator.

3. Will the public have an opportunity to comment?

Granting or denying the extension of the Phase I construction period does not require modifying the permit. If the permit was required to be modified, EPA would need to follow the process for modifying the permit contained in 40 CFR parts 55 and 124. At this time EPA is not planning to conduct a formal public comment period concerning the extension request.

4. EPA to provide a copy of their decision when made.

EPA will send our decision letter regarding the Phase I construction end date extension to Save Our Sound and other interested parties.

5. Will you be responding to our comment letter?

We are currently evaluating the comments made in your April 1, 2014 and will respond to you once we complete our evaluation.

Please feel free to call me if you have any further questions.

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From: Sandy Taylor [<mailto:sandyt@saveoursound.org>]
Sent: Friday, August 08, 2014 2:14 PM
To: McDonnell, Ida
Subject: Follow up on 5/22/14 Cape with Audra Parker

Ida:

I am following up your call with Audra Parker regarding Cape Wind's CA permit on 5/22/14.

There were several questions that you were going to get back to us on after reviewing them with Jill Metcalf.

- What is the status of EPA's review of Cape Wind's **EXTENSION** request?

- What is the status on of Cape Wind request, timeline and process?
- Will the public have an opportunity to comment?
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From: McDonnell, Ida
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Attachments: ESA.pdf

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1
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BOSTON, MA 02109-3912

AUG 12 2014

Michelle Morin
Chief, Environment Branch for Renewable Energy
Environmental Division
Bureau of Ocean Energy Management
381 Elden Street
Mail Stop 1328
Herndon, VA 20170

Dear Ms. Morin,

We have read the decision *Public Employees for Environmental Responsibility et al., 1:10-cv-01067-RBW (D.D.C., March 14, 2014)*, and are in receipt of copies of two letters addressed to you: one dated May 21, 2014, from John K. Bullard, Regional Administrator for the Northeast Region of the National Marine Fisheries, National Oceanic and Atmospheric Administration; and a second letter dated June 27, 2014, from Paul R. Phifer, Assistant Regional Director, Ecological Services, Fish and Wildlife Service.

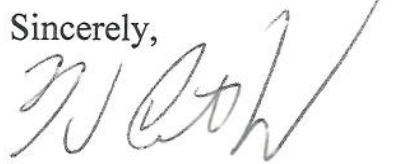
In response to the above referenced decision, Mr. Bullard's letter advises that the Incidental Take Statement (ITS) issued on December 30, 2010, is amended to include a new section entitled "ESA Listed Marine Mammals." He states that "The amended ITS includes Reasonable and Prudent Measures and implementing Terms and Conditions necessary and appropriate for monitoring and reporting any incidental take of listed whales..." He also states that "The amended ITS still includes the measures required to minimize, monitor, and report any take of sea turtles." The amended ITS, attached to the letter, states that "This concludes formal consultation with BOEM, ACOE and EPA regarding the proposed construction, operation and future decommissioning by Cape Wind Associates LLC of a wind energy project on Horseshoe Shoal."

Dr. Phifer's letter concludes that the Service has conducted the Court-ordered independent analyses of the reasonable and prudent measures, has made an administrative amendment to the Incidental Take Statement issued on November 21, 2008, and finds that no substantive changes to the final reasonable and prudent

measures in the ITS issued on November 21, 2008, are warranted. His letter states that the "consultation is complete" and confirms that the Army Corps of Engineers, Department of Energy and Environmental Protection Agency "may continue to rely on the BO [Biological Opinion] and ITS, as herein amended."

Based on these letters, and after reviewing our permit record, EPA finds no reason at this time to revisit the Outer Continental Shelf Air Permit issued by EPA for the Cape Wind Energy Project OCS-R1-01 concerning these issues, and finds that reinitiation of consultation is unnecessary. If you have any questions please contact Ida McDonnell at (617) 918-1653 or by electronic mail at mcdonnell.ida@epa.gov.

Sincerely,

A handwritten signature in dark ink, appearing to read "H. Curtis Spalding", is written over the word "Sincerely,".

H. Curtis Spalding
Regional Administrator

Schena, Cristeen

From: Sandy Taylor <sandyt@saveoursound.org>
Sent: Friday, August 08, 2014 2:14 PM
To: McDonnell, Ida
Subject: Follow up on 5/22/14 Cape with Audra Parker
Attachments: APNS Lte to EPA re permit 4 1 14.pdf

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SAVE OUR SOUND

alliance to protect nantucket sound

April 1, 2014

Mr. Curt Spalding
Regional Administrator
U.S. Environmental Protection Agency – Region 1
5 Post Office Square - Suite 100
Boston, MA 02109-3912

Re: Cape Wind Associates, LLC EPA Permit Number OCS-R1-01

Dear Administrator Spalding:

This letter relates to permit number OCS-R1-01 (“Permit”), issued to Cape Wind Associates, LLC (“Cape Wind”) on January 7, 2011. The Alliance to Protect Nantucket Sound (“the Alliance”) understands that by letter to EPA dated March 7, 2014 Cape Wind applied for an extension of the Phase 1 construction period defined in the permit. EPA must deny Cape Wind’s request for an extension of the Phase 1 period and declare the Permit invalid because the deadline by which Cape Wind was required to “commence construction” on this project has passed.

Under the terms of the Permit and the applicable regulations, the Permit is now invalid. The Permit states that “[t]his permit becomes invalid if Cape Wind does not commence construction within 18 months after the permit’s effective date.” Permit OCS-R1-01 at 1. Similarly, the applicable regulations state that “[a]n approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time.” 40 C.F.R. 55.6(b)(4).

Cape Wind applied for the Permit on December 17, 2008 and submitted several revisions to its application between 2008 and 2010. EPA published a draft Permit on June 10, 2010 and issued the final Permit on January 7, 2011. The Alliance petitioned the Environmental Appeals Board (“EAB”), asking it to review EPA’s issuance of the Permit but the EAB denied its petition. *See In re Cape Wind Assoc., LLC*, OCS Appeal No. 11-01 (EAB, May 20, 2011). Following the EAB decision, EPA issued its final decision on the Permit on June 2, 2011, indicating that the Permit would become effective that day.

Cape Wind was required to “commence construction” of the project by December 2, 2012, 18 months after the Permit’s June 2, 2011 effective date. By December 2, 2012, Cape Wind had not undertaken any activities which would satisfy its obligation to “commence construction” of the project. Even today, nearly three years after the Permit became effective and over a year after the Permit expired by its own terms, Cape Wind has still not “commenced construction” of the project.

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While Cape Wind has conducted pre-construction surveys and other preliminary information gathering activities, it has not yet begun actual construction. Cape Wind acknowledged this in its March 7, 2014 letter: “while Cape Wind Associates has begun its pre-construction work under Phase 1 of the permit, *actual construction* has been delayed...” Cape Wind Letter to Mr. Curtis Spalding, March 7, 2014 at 2 (emphasis added). Preliminary activities and other pre-construction efforts cannot satisfy Cape Wind’s obligation to “commence construction.”

The Permit does not define “commence construction” but states that “[t]erms not otherwise defined in this permit have the meaning assigned to them in the referenced Clean Air Act provisions and EPA regulations...” Permit OCS-R1-01 at 3. The regulations in Part 55 do not explicitly define “commence construction” but similar regulations in Part 52 define “commence construction” as:

Commence as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

- (i) Begun, or caused to begin, *a continuous program of actual on-site construction* of the source, to be completed within a reasonable time; or
- (ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.” 40 C.F.R. 52.21(b)(9) (emphasis added).

These regulations further define “begin actual construction” as:

“*Begin actual construction* means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.” *Id.* 52.21(b)(11).

From these regulations, it is clear that Cape Wind did not satisfy its obligation to “commence construction” by December 2, 2012. To have “commenced construction” under the “physical construction” branch of the applicability test, Cape Wind must 1) have begun *actual construction*, 2) the construction must have been *continuous*, and 3) the construction must have been completed within a *reasonable time*. By its own admission, Cape Wind cannot satisfy these requirements.

Cape Wind has not begun *actual construction*. Only activities that are *permanent* construction activities can satisfy Cape Wind's obligation to "commence construction". *Sierra Club v. Franklin County Power of Illinois, LLC*, 546 F.3d 918, 930 (7th Cir. 2008). In *Sierra Club*, the Court considered whether a company's construction activities were sufficient to satisfy its obligation to "commence construction" within 18 months of the effective date of its Part 52 permit and emphasized that construction activities must be permanent in order to satisfy the obligation to "commence construction". *Id.* The Court found that the company had not satisfied its obligation to "commence construction" in part because "the Company did not engage in any kind of permanent construction activity at all...the Company had laid no foundation and constructed no building supports, underground pipework, or permanent storage structures." *Id.*

Under these standards, Cape Wind did not satisfy its obligation to "commence construction" by December 2, 2012. By that date, Cape Wind had not commenced any permanent construction activities. It had not, and still has not, installed any building supports, prepared any foundations, laid any cables, or performed any other physical, permanent construction activities. Cape Wind's activities to date have involved pre-construction permitting, surveying, and other preparatory activities but none of these can be considered "actual construction" sufficient to satisfy its obligation to "commence construction" by December 2, 2012.

In fact, by the explicit terms of its lease with the Bureau of Ocean Energy Management ("BOEM"), Cape Wind *cannot* begin construction until it has finished conducting high resolution geophysical and geotechnical surveys: "Prior to the commencement of construction or any bottom-disturbing activities related to construction, the Lessee shall undertake a survey that meets the criteria of this section." BOEMRE Form MMS-0046 (July 2010). Cape Wind has not completed the pre-construction surveys BOEM has required Cape Wind to conduct before commencing construction. In fact, Cape Wind has applied to the National Marine Fisheries Service ("NMFS") for an incidental harassment authorization ("IHA") under the Marine Mammal Protection Act to undertake those activities. 79 Fed. Reg. 6167 (Feb. 3, 2014). As explained in the Cape Wind IHA application, it is seeking authorization for "continuation of previously authorized *pre-construction* High Resolution Geophysical (HRG) survey activities...." Cape Wind Renewal Application for Incidental Harassment Authorization, December 19, 2013 at 5. Cape Wind therefore asks NMFS for a new IHA to "complete the remaining 80% of the scope of work in 2013." *Id.* NMFS agrees that construction has not commenced, stating: "[s]urvey activities are necessary *prior to construction*." 79 Fed. Reg. 6168. In addition, Cape Wind states that no survey work including activities that impact the seafloor (i.e., result in "attachment") will occur during the remaining 80% of the survey work. *Id.* at 6171.

To satisfy the construction requirements of the Permit, Cape Wind would have had to violate the terms of its lease with BOEM.

Moreover, not only has Cape Wind not commenced construction, nothing that it has done to date has either been continuous or completed in a *reasonable time*. The only work that Cape Wind has done was a small portion of the pre-construction surveys BOEM has required it to conduct

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before commencing construction, and that work has been intermittent. Many years have elapsed since Cape Wind applied for the Permit in 2008 and it is clear that actual construction will not be initiated, let alone completed, in the foreseeable future.

Any argument that Cape Wind's performance of an OCS Attachment satisfies its obligation to "commence construction" is unpersuasive. While the Permit defines the "Phase 1 Start Date" as the date on which a vessel or barge associated with the project performs an OCS Attachment, it does not follow that this activity constitutes "commencing construction." Performing an OCS Attachment is neither a permanent, physical construction activity nor a continuous activity. Rather, performing an OCS Attachment is a pre-construction, non-permanent, episodic activity that does not satisfy the definition of "commence construction."

Further, the Permit clearly states that terms not defined in the Permit have the meaning assigned to them in the referenced Clean Air Act provisions and EPA regulations. Permit OCS-R1-01 at 3. Therefore, the definition of "commence construction" provided in the Clean Air Act applies. As explained above, Cape Wind has not satisfied its obligation to "commence construction" as it is defined in the Clean Air Act.

Cape Wind also has not satisfied the alternate definition of "commence construction," requiring a permittee to have entered into certain binding agreements or contractual obligations. 40 C.F.R. 52.21(b)(9)(ii). Cape Wind acknowledged that in its March 7, 2014 letter when it stated that the ongoing litigation of this project has prevented it from finalizing necessary financing agreements. Cape Wind Letter to Mr. Curtis Spalding, March 7, 2014 at 2.

The 18-month time limit included in these types of permits ensures that the permittee does not hold on to the permit for an unreasonably long period of time and prevents the permittee from constructing a project under outdated permitting requirements.

As more than four years have passed since Cape Wind submitted its application, the facts and data on which the Permit was based have changed and the Permit terms have become outdated. As the Alliance explained in its initial appeal of the Permit, the staging area that Cape Wind is using to construct the project has changed since Cape Wind initially submitted its permit application. In particular, significant additional information is now available to confirm that Cape Wind is using New Bedford Massachusetts, rather than Quonset, Rhode Island as the staging area for this project. See Attachment A. Such a shift in the staging area would fundamentally change the air quality analysis required for the project. Declaring the permit invalid (as it is) would not by itself forbid future construction of the permit, but it would require a new round of public comment and agency analysis to consider these important issues before the permit could be reissued.

These changed circumstances, combined with the many years that have elapsed since the Permit conditions were last considered, necessitate a new permit decision procedure. The public comment process benefits both citizens, by providing them a means by which to voice their concerns, and agencies, by providing them with relevant information to which they might not

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otherwise have access. The public comment process is a valuable way to inform agency decisionmaking and should be utilized to its full extent. Considering the overwhelming public interest in this project and the fact that the last time the public had an opportunity to comment on this project was nearly four years ago, EPA should welcome additional comments from interested parties.

Further, the Alliance would like to remind EPA of the President's directive regarding government transparency, "executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. All agencies should adopt a presumption in favor of disclosure..." Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009). The EPA has a responsibility to meet the obligations of transparency, participation and collaboration. Opening any future decisions related to Cape Wind's Permit furthers these goals.

Because Cape Wind did not "commence construction" within 18 months of the effective date of the Permit, EPA must deny Cape Wind's request to extend the Phase 1 period and must find the Permit invalid. Further, before making any future decisions related to this Permit, EPA should open those decisions to public notice and comment.

Please feel free to contact me if you have any questions.

Sincerely,



Audra Parker
President and CEO

The Honorable Sally Jewell, Secretary of the Interior

Schena, Cristeen

From: Stein, Mark
Sent: Thursday, July 10, 2014 3:55 PM
To: Dierker, Carl;Williamson, Timothy;Metcalf, Jill;Walsh-Rogalski, William;Dahl, Donald;McDonnell, Ida
Subject: FW: Cape Wind Remand
Attachments: DN 390-1_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-2_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-3_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-4_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-5_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-6_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-7_FDs' Notice_of_Completion_of_Remand.pdf; DN 390_FDs' Notice_of_Completion_of_Remand.pdf

Mark A. Stein
Senior Assistant Regional Counsel
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Tel. (617) 918-1077
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email: stein.mark@epa.gov

From: Williams, Robert P. (ENRD) [<mailto:Robert.P.Williams@usdoj.gov>]
Sent: Thursday, July 10, 2014 1:12 PM
To: Stein, Mark
Subject: Cape Wind Remand

Mark, as discussed here are the remand documents, including the letters from BOEM to NMFS and FWS. Let me know if you have any questions. Thanks.

Rob

Robert P. Williams, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
tel: (202) 305-0206
fax: (202) 305-0275
robert.p.williams@usdoj.gov

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United States Department of the Interior

BUREAU OF OCEAN ENERGY MANAGEMENT
WASHINGTON, DC 20240-0001

JUL 02 2014

Dr. Paul Phifer
Assistant Regional Director - Ecological Services
Northeast Regional Office
U.S. Fish and Wildlife Service
300 Westgate Center Drive
Hadley, Massachusetts 01035-9589

Re: FWS/Region 5/ES

Dear Dr. Phifer:

On June 27, 2014, the Bureau of Ocean Energy and Management received the U.S. Fish and Wildlife Services' administrative amendment to its Incidental Take Statement issued with the Biological Opinion on the Cape Wind Associates proposed wind energy facility to be located in Federal waters within Nantucket Sound.

Sincerely,

Michelle Morin
Chief, Environment Branch for Renewable Energy
Office of Renewable Energy Programs

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
WASHINGTON, D.C. 20240

28 May 2014

In Reply Refer To:
FWS/ABMO/ECON

Memorandum

To: Paul Phifer, Region 5, Assistant Regional Director – Ecological Services
From: Andrew Laughland, Ph.D., Division of Economics
Subject: Analysis of BOEM and Cape Wind Associates Assessments of RPM 2 from the Draft Biological Opinion

This memorandum documents consideration of the Fish and Wildlife Service's (FWS) proposed "reasonable and prudent measure" number 2 in the Draft Biological Opinion of October 31, 2008 (RPM 2). This economic review is being undertaken in response to the Court's remand to FWS in litigation over the Biological Opinion. Specifically, the question is whether or not RPM 2 would have a significant effect on the economics of the project.¹

RPM 2 identifies four conditions under which Cape Wind's turbines would be shut down:

- a. from April 24 to May 15, whenever visibility in the area was reduced to less than one-quarter mile;
- b. from August 20 to September 15, whenever visibility in the area was reduced to less than one-quarter mile;
- c. from August 20 to September 15, daily from one hour before sunrise to sunrise; and
- d. From August 20 to September 15, daily from sunset to 8:00 PM.

¹ This review is based largely on a letter from James F. Bennett, MMS, to Michael Amaral, FWS, received November 20, 2008, and its attachments:

- A letter from Geraldine E. Edens, McKenna Long & Aldridge, to Jill Lewandowski, MMS, dated November 18, 2008;
- *CWA's Response to How RPM No. 2 (Operational Adjustments) Would Affect the Viability and Reliability of the Proposed Project*, dated November 5, 2008;
- *The Fish and Wildlife Service's "Reasonable and Prudent Measure" No. 2 of the October 31st Draft Biological Opinion on the Cape Wind Proposal*, by James R. Woehr, MMS, dated November 20, 2008; and
- *Supplemental information for Cape Wind's response to the USFWS Draft Biological Opinion*, dated November 6, 2008.

Information about the power market and cyclical demand was found at the ISO New England web site:
<http://www.iso-ne.com/index.html>.

The October 31, 2008, Draft Biological Opinion argued that these limited measures to reduce the collision risk to staging roseate terns and, to a lesser extent piping plovers, did not affect the project's economics. Cape Wind Associates (CWA) presented arguments that the measures were not minor and therefore not justified as RPM's (*CWA's Response to how RPM No. 2 (Operational Adjustments) would affect the viability and reliability of the proposed project*, November 5, 2008). I reviewed CWA's arguments from an economic perspective and agree that including RPM 2 would substantially change the economic foundation of the project originally before the Bureau of Ocean Energy Management (BOEM; formerly the Minerals Management Service (MMS)).

Context – Project Funding

Cape Wind is being financed using project funding methods. CWA is an independent firm with no other business than building and operating the Cape Wind project. It must demonstrate to investors that this project alone will be able to generate the returns necessary to compensate them. Typically, when a large firm, such as an electric utility, seeks investors for a new power plant, the entire income stream of the company can be used to pay interest and dividends. All of the firm's assets are available and marketable if foreclosure is necessary. With project financing, only the income from the as yet unbuilt project will be available to pay interest and dividends. Should the project fail to come to fruition there may be no assets to forfeit. Depending on when the firm fails, assets like environmental approvals and partially built towers are not marketable. Thus, potential project investors are far more sensitive to risk than investors in established enterprises.

CWA argues that investors will assume the most extreme worst case in assessing the company's potential earnings. The confluence of events that would be required for some of the scenarios considered to come to pass are less likely than many other disasters that investors are clearly willing to ignore, e.g. a New England earthquake and tsunami. Nevertheless, an analysis based on average conditions without addressing the range of possible outcomes is insufficient. Reasonable worst case scenarios must also be considered in order to reflect the investor's point of view.

Zero Marginal Costs of Operation

Wind power is unusual in that it has zero marginal cost of production. Once the turbines, towers, and infrastructure are built, operations and maintenance costs are the same whether the turbines are turning or not. When the wind is sufficient, it requires only a twist of the blades to generate power. This has two consequences. When the turbines are running the entire price received is net revenue which can be applied to fixed costs. Second, there is no cost savings when the turbines are not turning. There is no price

so low that CWA is not better off running its turbines. Thus, the capacity factor² is as crucial to the firm's profitability as the price received for electricity.

Capacity Factor Arithmetic

FWS reviewed climatological records to estimate in the Draft Biological Opinion containing RPM 2 that operational adjustments a. and b. will reduce the daylight hours of operation by no more than 4% and 2%, respectively, during the relevant seasonal periods, or 19.5 hours in an average year. Operational adjustments c and d require 21 hours and 27 hours of shutdown annually. The FWS estimate totals 67.5 hours per year or 0.77% of the annual possible 8,760 hours (=365 days*24 hours/day) of operation.

CWA's business plan is based on a 37.1% capacity factor. That is, the firm believes that it will only be able to operate its turbines 37.1% of the time or 3,250 hours per year. If all of the hours of shutdown mandated by RPM 2 would have been hours when the turbines could have operated, the 67.5 hours lost is 2.1% of the total annual output of the project. Thus even using FWS average visibility assumptions, RPM 2 would have a substantial impact on project performance.

Given the sensitivity of project investors to risk, CWA argues that the possible RPM 2 operational adjustments a. and b. shutdowns should be considered to encompass the entire time during which they could be invoked, not just the amount of time suggested by average climatological records. That is the shutdowns could eliminate all of the daylight hours for 49 days of the year, 663 hours, rather than the FWS calculated 19.5 hours. Assuming these are hours when the turbines could have operated, the shutdowns represent 22% of the project's anticipated operating time. These are extreme and implausible assumptions. A more reasonable worst case would use the worst visibility year ever encountered during that period and planned maintenance schedules to determine the number of operating hours that may be lost to the shutdowns. Clearly, the result would be a substantial loss of production but not as disastrous as CWA suggests.

Power Price Cycles

CWA is likely to contract its output and renewable energy credits to power utilities before construction begins in order to lock in a price and market. The contracts establish a fixed price for a proportion of output. If sufficient contract buyers are not found for all of Cape Wind's output, the remainder will be sold in the ISO-New England hourly auction. Power prices are highly sensitive to weather and time of day. Hot August afternoons can send the auction price soaring as more expensive peaking power must be tapped to meet air conditioning demand. Swings from \$30/MwH in the morning to \$190/MwH in the afternoon are not unusual. Such times are highly profitable to zero marginal cost firms, like CWA, as they

² Capacity factor is the proportion of time the plant will be online.

benefit from the price run up without incurring any added cost. The August 20 to September 15 shutdowns of operational adjustments b and d will affect the firm's bottom line much more than the simple calculation of hours lost would imply.

Wind Patterns

A sea breeze occurs when air over land heats up faster than air over the water and the colder air is drawn ashore by the reduction in pressure. CWA anticipates generating significant amounts of power as a result of sea breezes that develop during summer afternoons on Cape Cod. The evening shutdown required in operational adjustment d occurs just as the sea breeze will be beginning to ebb. Feathering turbines at that time will mean CWA misses a productive wind opportunity on summer days.

Conclusions

Offshore wind energy production is a risky venture. Not only is the technology untried in stormy New England waters, the regulatory framework for offshore renewable energy is just forming and has changed over the last few years. Understandably, investors need to assess all of the risks of the project skeptically. Particularly because the project structure leaves no assets with alternative uses should some element of the project fail. That said, investors who are too risk-averse will miss a golden opportunity.

With a project funding model and a relatively low capacity factor, any additional shutdowns for Cape Wind will affect the financing and profitability of the project. When those shutdowns occur at times of high prices and high likelihood of usable winds, their impact is multiplied. These circumstances mean that RPM 2 would produce a substantial change in the operations and earning power of the project from what was proposed to BOEM.



United States Department of the Interior

FISH AND WILDLIFE SERVICE

300 Westgate Center Drive
Hadley, MA 01035-9589



In Reply Refer To:
FWS/Region 5/ES

JUN 27 2014

Ms. Michelle Morin
Chief, Environmental Branch for Renewable Energy
Environmental Division
Bureau of Ocean Energy Management
381 Elden Street, Mailstop 1328
Herndon, Virginia 20170

Dear Ms. Morin,

This letter serves as an administrative amendment to the U.S. Fish and Wildlife Service's (Service) Incidental Take Statement (ITS) issued with the Biological Opinion (BO) dated November 21, 2008, on Cape Wind Associates (CWA) proposed wind energy facility to be located in Federal waters within Horseshoe Shoal in Nantucket Sound. The Bureau of Ocean Energy Management¹ (BOEM) began informal consultation with the Service under section 7(a)(2) of the Endangered Species Act (ESA) starting in December of 2005. On May 19, 2008, BOEM initiated formal consultation, recognizing that its proposed action of issuing a lease to CWA was likely to cause take of the endangered roseate tern and threatened piping plover. Our BO marked the culmination of BOEM's consultation.

We issue this purely administrative amendment in response to the decision by the Federal district court in *Public Employees for Environmental Responsibility et al., v. Beaudreau et al.*, 1:10-cv-01067-RBW (D.D.C., March 14, 2014). In its memorandum opinion, the Court granted summary judgment to plaintiffs on their claim that the Service "violated the ESA by failing to make an independent determination about whether the feathering operational adjustment," proposed in our October 31, 2008 draft BO, "was a reasonable and prudent measure" (RPM). In the conclusion to its memorandum opinion, the Court remanded the case to the Service to "make the required independent determination on this point" (see Opinion at p. 88). In its order, the Court remanded "this case to the [Service] for it to issue reasonable and prudent measures consistent with [its] Memorandum Opinion." We have done so. For the reasons explained below, this administrative amendment does not require re-initiation of consultation on the Service's November 21, 2008 final BO.

¹ On October 1, 2011, the Bureau of Ocean Energy Management and Enforcement (BOEMRE), formerly the Minerals Management Service (MMS), was replaced by the BOEM and the Bureau of Safety and Environmental Enforcement (BSEE) as part of a major reorganization.

The final RPMs have not changed as a result of our analysis on remand. As directed by the Court, we hereby provide our independent evaluation of the initially proposed feathering RPM (also referenced as proposed RPM 2) and administratively amend the ITS to remove any suggestion that we may have simply delegated our authority under Section 7(b)(4)(ii) to BOEM and CWA in making our decision about the RPMs. We also confirm that the RPMs originally contained in the final BO remain reasonable and prudent.

ANALYSIS

In conducting our independent analysis on remand, we are guided by the ESA, its implementing regulations and our own Section 7 policies. According to our ESA Section 7 regulations, where the Service finds no jeopardy, we must provide in a biological opinion a written statement regarding incidental take that among other things,

“specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact”

(50 CFR 402.14(i)(1)(ii)). Those regulations also state that:

“[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes”

(50 CFR 402.14(i)(2)). The Service/National Marine Fisheries Service ESA Consultation Handbook reiterates the regulatory criteria and concludes that “[t]he test for reasonableness is whether the proposed measure would cause more than a minor change to the project” (Handbook at p. 4-50 (1998)).

Because the Court did not vacate the BO or ITS in any respect or order re-initiation of consultation or the reopening of the administrative record, our analysis of the RPMs relies on the information available to us when we finalized the BO and ITS. Relevant to the economics of the originally-proposed feathering RPM, our analysis included, but was not limited to, the materials below:

- 1) A letter from James F. Bennett, MMS, to Michael Amaral, Service, New England Field Office, received November 20, 2008, and its attachments:
 - A letter from Geraldine E. Edens, McKenna Long & Aldridge, to Jill Lewandowski, MMS, dated November 18, 2008;
 - *CWA's Response to How RPM No. 2 (Operational Adjustments) Would Affect the Viability and Reliability of the Proposed Project*, dated November 5, 2008;
 - *The Fish and Wildlife Service's "Reasonable and Prudent Measure" No. 2 of the October 31st Draft Biological Opinion on the Cape Wind Proposal*, by James R. Woehr, MMS, dated November 20, 2008; and
 - *Supplemental information for Cape Wind's response to the USFWS Draft Biological Opinion*, dated November 6, 2008.

2) The expert opinion of the Service's in-house economist, Dr. Andrew Laughland, who was provided the above information, and who also considered the power market and cyclical demand as of 2008: <http://www.iso-ne.com/index.html>.

Based on the cited materials, the review by Dr. Laughland, and my conversations with staff, we find that the draft feathering RPM would not be reasonable. In particular, I highlight Dr. Laughland's analysis of the possible reduction in the development's capacity factor (*i.e.*, the proportion of time the turbines will be online) related to peak energy production time (a possible decrease of 2.1 to 22 percent of the annual capacity factor) and demand periods (*e.g.*, summer afternoons where MWH auction prices are higher). Upon considering this range, we find that the proposed RPM would alter the proposed project's basic scope and timing, and constitutes more than a minor change to the project's intent and economic outlook.⁵ Thus, the Service concludes that the draft feathering RPM should not be included in the ITS issued with the November 21, 2008 BO.

We also reviewed the other RPMs included in the November 21, 2008 ITS, and find that they are still both "reasonable and prudent" and "necessary and appropriate," so should remain unchanged.

The only needed modification to the ITS therefore is the removal of the text under the heading "Operational Adjustments" starting on page 74 and continuing for four paragraphs onto page 75 of the November 21, 2008 BO. Those paragraphs represent the Service's prior finding regarding the omission of the feathering RPM from the BO that the Court found unacceptable. The rationale provided here represents the Service's independent determination on that point. Through this letter, we make the administrative correction to the ITS by striking the above-referenced text.

The Court did not order re-initiation of consultation, nor do we conclude that re-initiation is required by our response to the remand order. The Court made no findings regarding the validity of the BO's underlying effects analysis and no jeopardy conclusion. Nor did the court invalidate the BO. The ministerial change we make here has no effect on the ultimate conclusion of the BO or the requirements of the ITS. There is therefore no reason to produce a new BO at this time. Moreover, none of the consultation triggers identified in 50 CFR 402.16 are implicated by the remand:

[R]e-initiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and if:

² Our determination that the feathering RPM would alter the basic scope and timing of the action, and also constitutes more than a minor change, is project specific. We do not intend it to be broadly applied to subsequent consultations. But in the context of this project, it is a sufficient basis upon which to conclude that the measure is not reasonable. It is even more compelling in light of the uncertainty that the Service expressed in our administrative record about whether or to what degree such a measure would actually reduce the take of the two protected bird species.

- (1) the amount or extent of incidental take is exceeded;
- (2) a new species is listed or critical habitat designated that may be affected by the action;
- (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or
- (4) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.

Furthermore, the Court ruled in Federal Defendants' favor on all remaining claims in the litigation, which included Claim I that alleged that the Service and BOEM violated the ESA by failing to reinitiate consultation on birds (*See* Second Amended Complaint, ECF No. 47, p. 37).

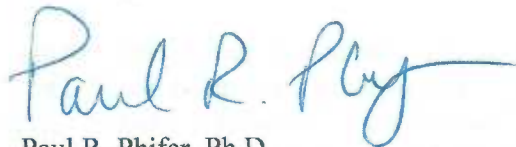
CONCLUSION

In summary, the Service has conducted the Court-ordered independent analyses of the RPMs. We find that no substantive changes to the final RPMs in the ITS issued with the November 21, 2008 BO are warranted. With the above administrative correction, the consultation is complete, and no further action by BOEM is presently required.

We are copying the Army Corps of Engineers, Department of Energy, and Environmental Protection Agency on this correspondence to make these additional action agencies aware of this ministerial change, confirm that their respective consultations remain valid and complete, and state that they may continue to rely on the BO and ITS, as herein amended.³

The Service looks forward to continued cooperation on this project. Should you have any questions regarding the consultation process or implementing the BO, please do not hesitate to contact me or my staff. Susi vonOettingen is the lead biologist for the consultation. You can reach her at 603-223-2541 or by electronic mail at susi_vonoettingen@fws.gov.

Sincerely,



Paul R. Phifer, Ph.D.
Assistant Regional Director
Ecological Services

cc: Jennifer L. McCarthy
U.S. Army Corps of Engineers

³ BOEM served as the lead agency during the consultation, on its own behalf and that of the Army Corps of Engineers. The BO therefore covers both entities. DOE and EPA independently consulted with the Service, concluding with correspondence dated April 19, 2013 and December 10, 2010, respectively.

Jill Lewandowski
Bureau of Ocean Energy Management

Matthew McMillen
Director Environmental Compliance

Ida McDonnell
U.S. EPA New England, Region I



United States Department of the Interior

BUREAU OF OCEAN ENERGY MANAGEMENT

WASHINGTON, DC 20240-0001

Mr. J. K Bullard
Regional Administrator, NOAA
National Marine Fisheries Service
Greater Atlantic Regional Fisheries Office
55 Great Republic Drive
Gloucester, MA 01930-2276

JUN 04 2014

Dear Mr. Bullard,

Thank you for your letter received by BOEM on May 23, 2014, with the amended Incidental Take Statement (ITS) for the biological opinion (Opinion) issued by your office on December 30, 2010, under Section 7(a)(2) of the Endangered Species Act, regarding the proposed construction, operation and future decommissioning by Cape Wind Associates, LLC (CWA) of a wind energy project offshore Massachusetts located in Nantucket Sound on the Outer Continental Shelf.

BOEM agrees that if there is any incidental take of North Atlantic right whales, humpback whales or fin whales, the specified amount or extent of incidental take will be exceeded, and, pursuant to 50 CFR Part 402.14(h)(4) and 50 CFR Part 402.16(a), consultation must be reinitiated immediately. BOEM also agrees that the amended ITS includes Reasonable and Prudent Measures (RPMs) necessary and appropriate for monitoring and reporting any incidental take of listed whales. As your letter correctly points out, these measures are consistent with monitoring and reporting requirements included in your 2010 Opinion and the measures required by BOEM in lease OCS-A 0478 held by CWA and executed on November 1, 2010. BOEM will ensure that CWA complies with the RPMs as described in the amended ITS.

Thank you for your update in this regard and we look forward to further cooperation with your office to minimize the potential effects offshore renewable energy projects in the northeast region. For further information regarding this letter, please contact Dr. Desray Reeb at (703) 787-1768 or via e-mail at Desray.Reeb@boem.gov.

Sincerely,

Ms. Michelle Morin
Chief, Environment Branch for Renewable Energy


cc: Lewandowski – BOEM
McDonnell – EPA RI
Adams – ACOE
McMillan – DOE



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

MAY 21 2014

MEMORANDUM FOR: John K. Bullard
Regional Administrator

FROM: Mary A. Colligan 
Assistant Regional Administrator for Protected Resources

SUBJECT: Amended Incidental Take Statement for the December 30, 2010
Biological Opinion issued to the Bureau of Ocean Energy
Management (BOEM) regarding the construction, operation and
decommissioning of Cape Wind Associates LLC proposed wind
energy facility – **TRANSMITTAL MEMORANDUM**

The purpose of this memorandum is to inform you of issues related to the recent court decision pertaining to our December 2010 Biological Opinion and Incidental Take Statement (ITS) on the Cape Wind Energy Project. I also seek your approval of an amended ITS prepared in response to the court's order in that case.

CAPE WIND PROJECT

Cape Wind's proposed action entails the construction of a wind energy facility (wind park) consisting of 130 wind turbine generators (WTG) located on Horseshoe Shoal in Nantucket Sound, Massachusetts as well as installation of submarine cable connecting the WTGs and connecting to land. Additionally, Cape Wind is carrying out geotechnical and geophysical surveys. The northernmost WTGs would be located approximately 3.8 miles from the dry rock feature offshore near Bishop and Clerks and approximately 5.2 miles from Point Gammon on the mainland; the southernmost part of the wind park would be approximately 11 miles from Nantucket Island (Great Point) and the westernmost WTG would be approximately 5.5 miles from the island of Martha's Vineyard (Cape Poge). Installation of the WTGs will comprise of four activities: (1) installation of the foundation monopiles; (2) erection of the wind turbine generators; (3) installation of the submarine cables; and, (4) installation of the scour protection. The 130 WTGs and the electric service platform (ESP) would occupy a total of 0.67 acres of submerged land. Scour protection for the WTGs would cover an additional 2.5 acres. During installation of the WTGs, ESP, cable and scour protection, it is anticipated that approximately 867 acres would be temporarily disturbed. Electricity output is expected to be 468 megawatts (MW) distributed to the existing power grid on shore.

The action area for this consultation includes the footprint of the energy project where the WTGs and ESP will be installed, the submarine cable route, the route between the staging and operations



areas in Falmouth, MA, New Bedford, MA and Quonset Point, RI and the project site, as well as the underwater area where effects of the project (i.e., increases in suspended sediment and underwater noise) will be experienced. The action area is largely consistent with the area identified as Nantucket Sound, but also includes the vessel transit routes outside of the Sound.

CONSULTATION HISTORY

Cape Wind Associates began preliminary work on siting and designing a wind energy project in 2000. In November 2001, Cape Wind applied for a permit from the US Army Corps of Engineers (ACOE) to construct and operate a wind-powered electrical generating facility on Horseshoe Shoal in Nantucket Sound, Massachusetts. Informal consultation between NMFS and the ACOE continued throughout 2001-2004.

In August 2005, the Energy Policy Act of 2005 gave the Department of the Interior's (DOI) Minerals Management Service (now BOEM) authority for issuing leases, easements or rights-of-way for alternative energy projects on the Outer Continental Shelf (OCS). At this time, purview over the Cape Wind proposal was transferred from the ACOE to BOEM.

We began discussing consultation requirements with BOEM in January 2006. Consultation was initiated on May 22, 2008 and completed with the issuance of a Biological Opinion on November 18, 2008. In the spring of 2010, over 90 North Atlantic right whales were observed in Rhode Island Sound and nearby waters, including areas to be transited by project vessels originating from the staging site at Quonset, RI. While right whales were not sighted in the area proposed for construction (i.e., the project footprint on Horseshoe Shoal within Nantucket Sound), right whales were observed in nearby areas and along the route that would be used by vessels moving between the project footprint and the project staging area near Quonset, RI. When compared to sightings in previous years, these sightings represent a higher than average number of right whales in the action area and nearby areas. As noted in BOEM's July 13, 2010 letter to us, these sightings represented new information that when analyzed may have revealed effects of the action that may affect listed species in a manner or to an extent not previously considered. We concurred with BOEM's determination that reinitiation of consultation was appropriate; specifically, to consider the new information on the presence of right whales in the action area. Consultation was reinitiated on July 26, 2010. On October 6, 2010 a lease was signed by Secretary of the Interior Ken Salazar and Cape Wind Associates President Jim Gordon. The lease has a 33-year term. Consultation was completed with the issuance of a Biological Opinion on December 30, 2010.

DECEMBER 30, 2010 BIOLOGICAL OPINION

We determined the action considered in the Opinion may affect the following endangered or threatened species under our jurisdiction: North Atlantic right whale (*Eubalaena glacialis*), humpback whale (*Megaptera novaeangliae*), fin whale (*Balaenoptera physalus*), and several sea turtle species. The Opinion includes an analysis of effects resulting from construction, operation, maintenance and decommissioning of the project, as well as the effects of a post-lease geophysical and geotechnical survey and certain non-routine and accidental events. We determined that, with the exception of certain acoustic effects to sea turtles, any adverse effects associated with the proposed activities were insignificant and/or discountable. With regard to acoustic effects on sea turtles, we anticipated a small level of take would occur but that it was not likely to jeopardize their continued existence. As a result, we included an ITS exempting the predicted amount of sea

turtle take. With regard to ESA-listed whales, we concluded that all effects to them were insignificant and discountable; therefore, the action was not likely to adversely affect and not likely to jeopardize them.

LITIGATION HISTORY

The case, Public Employees for Environmental Responsibility et al., v. Beaudreau et al., 1:10-cv-01067-RBW (D.D.C., March 14, 2014), consolidates four challenges related to the Cape Wind renewable energy project. The Plaintiffs, a coalition of environmental organizations, the Wampanoag Tribe of Gay Head, several individuals, and a municipality in Massachusetts, alleged that the U.S. Fish and Wildlife Service (FWS), Bureau of Ocean Energy Management (BOEM), NOAA, the U.S. Coast Guard, and the U.S. Army Corps of Engineers violated a number of federal environmental and procedural statutes when they issued decisions relating to the Cape Wind project.

Claims Against NMFS' Biological Opinion

As discussed above, in the Opinion, we concluded, in part, that the project was not likely to adversely affect right whales and that incidental take was not likely to occur. Consequently, we did not issue an Incidental Take Statement for right whales. The Opinion also analyzed the effects of the action on sea turtles. NOAA predicted incidental take of sea turtles and issued an Incidental Take Statement for them. Plaintiffs claimed that the Opinion underestimated impacts to right whales and sea turtles and that it violated the Endangered Species Act by failing to include an Incidental Take Statement for right whales.

Court decision

On March 14, 2014, the district court denied Plaintiffs' claims that we underestimated impacts on right whales and sea turtles. However, notwithstanding our determination that the project is "not likely to adversely affect" right whales, the court held that we were required to issue an Incidental Take Statement for right whales. The court relied on 50 C.F.R. 402.14(g)(7), which states that NOAA Fisheries must "formulate a statement concerning incidental take, if such take may occur," and a Fish and Wildlife Service case, Pacific Shores Subdivision California Water District v. U.S. Army Corps of Engineers, 538 F. Supp.2d 242, 261 (D.D.C. 2008), which relied on the same regulatory provision, to conclude that an Incidental Take Statement is required when take "may occur." The court noted that the term "may" is broadly interpreted under the ESA regulations, and reasoned that the requirement for an Incidental Take Statement is triggered by the possibility of take, even if it is unlikely. The court concluded that take "may occur," because the Opinion discussed the fact that right whales have traversed part of the action area as well as the routes traveled by the project vessels. The court referenced the Section 7 Consultation Handbook, which states that when incidental take is not anticipated, NOAA should include a statement that reads "[t]he Service does not anticipate the proposed action will incidentally take any (species)." The court pointed out that the Opinion never stated that incidental take would not occur or was not anticipated. The court also discussed the regulatory requirement to reinitiate consultation if, among other things, the amount or extent of taking specified in the incidental take statement is exceeded (criterion (a)), or new information reveals effects of the action that may affect listed species in a manner or to an extent not previously considered (criterion (b)). The court stated that the agency should have provided an Incidental Take Statement for right whales and, in it,

addressed when reinitiation would be triggered. The court remanded the Opinion to NOAA and ordered us to issue an Incidental Take Statement for right whales.

PROPOSED AMENDMENT OF THE ITS

To address the court's remand order, we are amending the existing Incidental Take Statement for sea turtles to state that we do not anticipate the proposed action will incidentally take any right whales, humpbacks, and fin whales. While the remand order (and the plaintiff's complaint) was specific to right whales, we are also addressing humpback and fin whales in the amended Incidental Take Statement. Because our conclusions for humpback and fin whales are the same as for right whales, it is also appropriate to make a "no take anticipated" statement for these species.

The statement that we do not anticipate the proposed action will incidentally take any of the whales tracks the language recommended by the Joint FWS-NMFS Section 7 Consultation Handbook (page 4-48) in situations where NMFS concludes take is not reasonably likely to occur. The court relied, in part, on this language in the Consultation Handbook to arrive at its holding that we must issue an Incidental Take Statement for right whales. In addition, to address the court's discussion of the triggers for reinitiation, the Incidental Take Statement will state that, for the whales, the amount or extent of take we anticipate is zero. In a footnote, the court identified cases in which other courts have determined that, generally speaking, an incidental take level of zero is valid, but that it was up to the agency to determine whether "zero" is appropriate in this situation. In the Biological Opinion, we explained that all effects to the three species of ESA-listed whales from the proposed action would be insignificant or discountable as those terms are defined in the Consultation Handbook¹ and, therefore, the proposed action was not likely to adversely affect the whales. Consequently, the Opinion concluded take was not likely to occur. (See, e.g., pp. 85-124). Given the record for this action establishing that take is not reasonably likely to occur and the Consultation Handbook's direction to specify the amount of incidental take that is reasonably likely to occur, we conclude that setting the incidental take amount at zero is appropriate.

Setting the amount of take at zero sets a clear trigger for reinitiation: If one take were to occur, it would exceed the amount or extent specified (zero) and trigger reinitiation under criterion (a) (see 50 CFR § 402.16). One take would also constitute new information not previously considered under criterion (b), given the available information at the time supported a finding that the proposed action was not likely to adversely affect listed whales and, therefore, that incidental take was not reasonably likely to occur, conclusions the court upheld. In addition, the jeopardy analysis clearly does not examine what the impact to the species would be if a take of a right, humpback, or fin whale were to occur. Reinitiation would be required in order to conduct such an analysis.

¹ The Consultation Handbook states that a "not likely to adversely affect" determination is "the appropriate conclusion when effects on listed species are expected to be discountable, insignificant, or completely beneficial....Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur" (page xv-xvi). In addition to advising consulting biologists to state, "The Service does not anticipate the proposed action will incidentally take any [species]" if take is not anticipated to occur, the Consultation Handbook also states that the section of an Incidental Take Statement on the amount or extent of take outlines the amount that is anticipated and expresses the number of individuals reasonably likely to be taken (page 4-47).

The amended Incidental Take Statement also states that we are not requiring any Reasonable and Prudent Measures and Terms and Conditions to minimize take of right whales, humpback whales or fin whales. Because we do not anticipate any incidental take of these whale species, there is no amount or extent of incidental take to minimize and, therefore, reasonable and prudent measures are not necessary or appropriate.

We have considered whether there is sufficient monitoring and reporting in place to allow us to know if take does occur. As discussed in the 2010 Opinion, several monitoring requirements are part of the proposed action. These measures are included as requirements of the lease granted to Cape Wind on November 1, 2010.² Specific to whales, Cape Wind is required to post a look out on all vessels associated with the project. This lookout must be on watch for whales and be in direct communication with the vessel captain so that if a whale is spotted, speed can be reduced and whales can be avoided. Part 9(1)(b)(ii) of the lease requires compliance with Notice to Lessee's (NTL) 2007-GO4, which requires reporting of any strikes of marine mammals to BOEM and NMFS within 24 hours. In the unanticipated event that a whale is struck, the incident must be reported to BOEM and NMFS within 24 hours. The combination of the dedicated lookout and the reporting requirement ensures that if a whale is struck by a project vessel, we would be promptly informed and consultation could be reinitiated. Dedicated observers are also required during the geophysical surveys and during pile driving. While we do not anticipate listed whales will be in the exclusion zone at the time the survey equipment is operating or pile driving is taking place, if project personnel do observe one or more, they must communicate those observations and initiate shut down provisions. Although the accompanying Opinion explains that listed whales are extremely unlikely to be in the action area, the requirement to monitor the Right Whale Sightings Advisory System (<http://www.nefsc.noaa.gov/psb/surveys/>) is an important complement to observing the exclusion zones. Monitoring the Right Whale Sightings Advisory System would enable project personnel to know if right whales have been sighted in the action area, including beyond the exclusion zones. All observations of protected species must be promptly reported to NMFS and all observations of injured or dead animals must be reported within 24 hours. Reporting of injured or dead whales is required during pile driving, the jet plow operations for cable laying, and the geophysical surveys by Section 9(1)(f), 9(1)(k), and 9(1)(l) of Addendum C of the lease document. These measures ensure that if the incidental take of a whale were to occur during any project activity, it will be detected and we will be notified so that consultation can be reinitiated.

We have determined these monitoring and reporting requirements will enable us to know when a take, if any, occurs. Requiring different monitoring and reporting measures would duplicate effort for no apparent benefit to listed species. Therefore, no additional monitoring and reporting requirements are necessary or appropriate; the ITS will require the same monitoring and reporting measures as those required by the lease to ensure that if the amount of take (zero) is exceeded, we will be informed promptly, and consultation will be reinitiated. No other monitoring or reporting requirements are necessary.

² Lease document available at:
http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/CapeWind_signed_lease.pdf

According to ESA Section 7(b)(4), if NMFS concludes that the taking of an ESA-listed marine mammal will not jeopardize its continued existence and such taking is authorized under Section 101(a)(5) of the MMPA, the agency must issue an Incidental Take Statement that, in part, specifies those measures necessary to comply with Section 101(a)(5) with regard to such taking. To address this interplay of the ESA and MMPA, the amended Incidental Take Statement will also indicate that, because we determined that we do not anticipate any incidental take of ESA-listed whales will occur, no take authorization is required under the MMPA for purposes of the ESA.

MMPA INCIDENTAL HARASSMENT AUTHORIZATION

In July 2011, pursuant to section 101(a)(5)(D) of the Marine Mammal Protection Act, Cape Wind applied for authorization to harass small numbers of marine mammals incidental to the high resolution geophysical survey. The application was for the incidental take by Level B harassment only of minke whale (*Balaenoptera actuorostrata*), Atlantic white-sided dolphin (*Lagenorhynchus acutus*), harbor porpoise (*Phocoena phocoena*), gray seal (*Halichoerus grypis*), and harbor seal (*Phoca vitulina*). These species are protected under the MMPA but are not listed as threatened or endangered under the ESA. NMFS Office of Protected Resources issued an Incidental Harassment Authorization (IHA) on December 22, 2011. During the summer of 2012, Cape Wind completed their geotechnical surveys and approximately 20% of the geophysical surveys; no incidental take of marine mammals was observed. In December 2012, Cape Wind applied to renew their IHA so that the surveys could be completed in 2013. A new IHA was issued on March 21, 2013. Surveys were not carried out in 2013. In December 2013, Cape Wind applied for an additional IHA for the remainder of the surveys, now scheduled to occur in 2014. The Office of Protected Resources is in the midst of processing this application and, in February issued a notice of a proposed IHA in the Federal Register (79 FR 6167, February 3, 2014). NMFS did not propose to authorize any take of listed whales. The final IHA was issued on April 25, 2014 (79 FR 25835-25844, May 6, 2014). The IHA will require CWA to abide by certain mitigation measures to further reduce the risk of taking marine mammals. Those measures include: establishment of an exclusion zone; shut down and delay procedures; soft-start procedures; monitoring of the exclusion zone; and reporting of all observations of marine mammals. These measures are consistent with the measures required by the amended Incidental Take Statement.

On April 24, 2014, we completed ESA section 7 informal consultation on issuance of the IHA by NMFS to Cape Wind authorizing the take (by Level B harassment) of five non-ESA listed marine mammals (minke whale, Atlantic white-sided dolphin, harbor porpoise, gray seal, and harbor seal). In the consultation letter, we determined the effects of the geophysical survey have already been the subject of consultation and the only additional action proposed by the Office of Protected Resources is authorizing Level B harassment of these five non-ESA listed marine mammals. This authorization does not introduce any new effects to ESA listed species beyond those considered in the 2010 Biological Opinion issued to BOEM. We concurred with the determination that: (a) ESA-listed marine mammals are extremely unlikely to be in the action area, (b) they are extremely unlikely to be affected by disturbing or injurious sound levels, and (c) sufficient mitigation measures are required to ensure there is no take of listed marine mammals. As a result, we concurred with the determination that effects of the proposed permit action on ESA-listed marine mammals will be insignificant and discountable and that the action is therefore not likely to adversely affect ESA-listed marine mammals under NMFS jurisdiction. Therefore, no further consultation pursuant to section 7 of the ESA is required. The take of sea turtles during survey

activities is outside the scope of the consultation on the proposed IHA, but is addressed by the 2010 Biological Opinion on the overall Cape Wind project and this amended Incidental Take Statement.

REINITIATION TRIGGERS

As provided in 50 CFR 402.16, reinitiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and if: (a) the amount or extent of incidental take is exceeded; (b) a new species is listed or critical habitat designated that may be affected by the action; (c) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (d) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. We have reviewed these triggers to determine if there is any cause to reinitiate the consultation, in addition to amending the Incidental Take Statement.

The only activities that have taken place to date are the geotechnical surveys and approximately 20% of the scheduled geophysical surveys (completed in 2012, remaining surveys currently scheduled for 2014). No take of any listed species was anticipated to occur as a result of the geotechnical surveys, and we have no information indicating that any take did occur. Under the terms of the Incidental Take Statement, Cape Wind is required to report any observed injury or mortality of sea turtles to us within 24 hours. As required by Part 9(1)(f) of Addendum C of the November 1, 2010 lease, Cape Wind is required to report any observed injury or mortality of a marine mammal within 24 hours; we did not receive any reports in 2012. We are not aware of any modifications to the proposed action that would cause effects to listed species or critical habitat not considered in the 2010 Opinion and are not aware of any new information that reveals effects of the action that may affect listed species or critical habitat or to an extent not previously considered.

Since the 2010 Opinion was completed, new species have been listed. On March 16, 2010, NMFS proposed to list 9 Distinct Population Segments (DPS) of loggerhead sea turtle, one of which (the Northwest Atlantic DPS) occurs in the Cape Wind action area. The final rule listing the Northwest Atlantic DPS as threatened was published on September 22, 2011. Our 2010 Cape Wind Opinion considered effects of the action of loggerhead sea turtles as they were listed at that time (as one species with global distribution). In our December 30, 2010 Cape Wind Opinion, we addressed the proposed listing (see p. 123) and determined that a conference was not required. Following the publication of the final rule, we prepared a Memorandum to the Record (enclosed for your reference) memorializing our determination that the effects analysis and jeopardy analysis included in the 2010 Cape Wind Opinion remains valid for the Northwest Atlantic DPS. Reinitiation based on this new listing is not required. In July 2013, we proposed to designate critical habitat for the Northwest Atlantic DPS; however, the Cape Wind action area does not overlap with the proposed critical habitat area. Therefore, a conference on the effects of the Cape Wind project on proposed loggerhead sea turtle critical habitat is not required.

Responding to the court's remand order does not trigger reinitiation of consultation. As discussed above, the court upheld the Biological Opinion's effects analysis, but ordered the agency to issue an Incidental Take Statement for right whales. Given the underlying effects analysis and no

MAY 21 2014

INCIDENTAL TAKE STATEMENT- Amended

[NOTE: We have prepared this amended Incidental Take Statement in response to the decision of the Federal district court in Public Employees for Environmental Responsibility (PEER) et al., v. Beaudreau et al., 1:10-cv-01067-RBW (D.D.C., March 14, 2014) and the particular circumstances of that court's remand order.]

Section 9 of the ESA prohibits the take of endangered species. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. NMFS interprets the term "harm" as an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering (50 CFR §222.102). Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. The term "harass" has not been defined by NMFS; however, it is commonly understood to mean to annoy or bother. In addition, legislative history helps elucidate Congress' intent: "[take] includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young" (HR Rep. 93-412, 1973). Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited under the ESA provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

Amount or Extent of Incidental Take***Sea Turtles***

The proposed action has the potential to directly affect loggerhead, Kemp's ridley, green and leatherback sea turtles by causing them to be exposed to potentially harassing levels of sound during pile driving and the high resolution geophysical survey. As explained in the "Effects of the Action" section of the accompanying Opinion, only sea turtles located within a 34.56 square km area surrounding the pile being driven will be exposed to noise levels between 160 and 180 dB. As explained on page 90 of the "Effects of the Action" section, NMFS has estimated that between 3 and 7 sea turtles are likely to be exposed to disturbing levels of noise during each 4 hour pile driving event. As pile driving will occur for approximately four to six hours per pile over a period of approximately eight months, the potential for exposure will be limited to that time period only. As explained in the "Effects of the Action" section, during the high resolution geophysical survey program, any sea turtles located within 227 meters from the chirp and 386 meters from the boomer will be exposed to noise levels between 160 and 180 dB. During the survey, an area of approximately 148 square kilometers will be surveyed. Based on the estimates of sea turtle density in the action area (explained on page 90), NMFS estimates that between 13 and 28 sea turtles would be exposed to disturbing levels of noise during the survey. At any given time during the survey, an approximately 0.384 square kilometer area will have noise levels between 160 and 180 dB.

Exposure of sea turtles to sound levels greater than 160 dB will be considered harassment

because that level of noise will disturb sea turtles and their normal behaviors (i.e., resting, foraging or migrating through the area) will be interrupted. Any sea turtles located within 3.4km of the pile being driven will be exposed to these disturbing noise levels and are likely to exhibit avoidance behavior which would cause the alteration of normal behaviors. As loggerhead, Kemp's ridley, green and leatherback sea turtles are likely to be present in the action area and exposed to potentially harassing sound levels, harassment of any of these species could occur and NMFS anticipates that the 3-7 sea turtles exposed to harassing noise levels during each pile driving event and the 13-28 sea turtles exposed to harassing levels of noise during the geophysical survey will be a combination of these species. As sea turtles are only likely to occur in the action area between June and November, only pile driving occurring during these months will result in the harassment of sea turtles. Similarly, effects to sea turtles from the high resolution geophysical survey would only occur if the survey took place between June and November. Incidental take via harassment will be limited to the spatial and temporal extent indicated above.

NMFS believes this level of incidental take is reasonable given the likely seasonal distribution and abundance of sea turtles in the action area and the modeling results provided by BOEM in the BA and DEIS. In the accompanying biological opinion, NMFS determined that this level of anticipated take is not likely to result in jeopardy to these species. As explained above, any incidental take of loggerhead, Kemp's ridley, green and leatherback sea turtles will be limited to: the time period when pile driving is occurring and be limited to a 34.56 square kilometer area surrounding the pile being driven and the time period when the high resolution geophysical survey is occurring and be limited to a 0.384 square kilometer area at any given time during the survey.

ESA Listed Marine Mammals

As defined in the NMFS/FWS Endangered Species Consultation Handbook, a "not likely to adversely affect" determination "is the appropriate conclusion when effects on listed species are expected to be discountable, insignificant, or completely beneficial. Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur" (page xiv-xv). As explained in the "Effects of the Action" and "Conclusion" sections of the accompanying Opinion, we determined that all effects to North Atlantic right whales, humpback whales and fin whales will be insignificant and discountable. As a result, we concluded that the proposed action may affect, but is not likely to adversely affect, these species and that incidental take is unlikely to occur. In situations in which NMFS does not consider take to be reasonably likely to occur, the Consultation Handbook advises NMFS to state that it does not anticipate any take (page 4-48). Consequently, in light of the Biological Opinion's analysis of, and conclusions about, the effects of the proposed action on listed whales, NMFS does not anticipate the proposed action will incidentally take any North Atlantic right whales, humpback whales or fin whales. In addition, given the PEER court's order to issue an Incidental Take Statement that addresses what number of takes would trigger reinitiation of consultation, and in light of the accompanying Biological Opinion, we are specifying that the amount of incidental take of right whales, humpbacks, and fin whales anticipated is zero. If there is any incidental take of North Atlantic right whales, humpback whales or fin whales, we will consider the

specified amount or extent of incidental take to be exceeded, and, pursuant to 50 CFR §§ 402.14(i)(4) and 402.16, consultation must be reinitiated immediately.

Reasonable and Prudent Measures and Terms and Conditions

Reasonable and Prudent Measures for ESA Listed Marine Mammals

We are not requiring any reasonable or prudent measures or terms and conditions to minimize take of right whales, humpback whales or fin whales. This is because we do not anticipate any incidental take of these whale species; therefore, there is no amount or extent of incidental take to minimize and no Reasonable and Prudent Measures to minimize take of these species are necessary or appropriate.

We have considered whether there is sufficient monitoring in place to allow us to know if take does occur. As discussed in the Opinion, several monitoring requirements are part of the proposed action. These measures are included as requirements of the lease granted to Cape Wind on November 1, 2010.¹ Specific to whales, Cape Wind is required to post a look out on all vessels associated with the project. This lookout must be on watch for whales and be in direct communication with the vessel captain so that if a whale is spotted, speed can be reduced and whales can be avoided. Part 9(1)(b)(ii) of the lease requires compliance with Notice to Lessee's (NTL) 2007-GO4 which requires reporting of any strikes of marine mammals to BOEM and NMFS within 24-hours. In the unanticipated event that a whale is struck, the incident must be reported to BOEM and NMFS within 24 hours. The combination of the dedicated lookout and the reporting requirement ensures that if a whale is struck by a project vessel, we would be promptly informed and consultation could be reinitiated. Dedicated observers are also required during the geophysical surveys and during pile driving. While we do not anticipate listed whales will be in the exclusion zone at the time the survey equipment is operating or pile driving is taking place, if project personnel do observe one or more, they must communicate those observations and initiate shut down provisions. Although the accompanying Opinion explains that listed whales are extremely unlikely to be in the action area, the requirement to monitor the Right Whale Sightings Advisory System (<http://www.nefsc.noaa.gov/psb/surveys/>) is an important complement to observing the exclusion zones. Monitoring the Right Whale Sightings Advisory System would enable project personnel to know if right whales have been sighted in the action area, including beyond the exclusion zones. All observations of protected species must be promptly reported to NMFS and all observations of injured or dead animals must be reported within 24 hours. Reporting of injured or dead whales is required during pile driving, the jet plow operations for cable laying, and the geophysical surveys by Section 9(1)(f), 9(1)(k), and 9(1)(l) of Addendum C of the lease document. We have determined that these monitoring and reporting measures are sufficient to allow us to know when a take occurs; no other monitoring and reporting requirements are necessary or appropriate. Therefore, in order to ensure that any unanticipated incidental take of whales is detected and reported, the following monitoring and reporting measures are required by this ITS:

1. BOEM and Cape Wind Associates must ensure that lookouts are posted on all project related vessels, including the geophysical survey vessels and the cable laying vessel, to monitor for the presence of whales and to communicate with the captain to slow down

¹ Lease document available at:
http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/CapeWind_signed_lease.pdf

and avoid any whales that are sighted.

2. BOEM and Cape Wind Associates must ensure that observers are present during the geophysical surveys to monitor for the presence of whales.
3. BOEM and Cape Wind Associates must ensure that observers are present during pile driving to monitor for the presence of whales.
4. BOEM and Cape Wind Associates must ensure that any observations of whales are reported to NMFS.

The following Terms and Conditions are required to implement the above monitoring and reporting measures. All of these Terms and Conditions are consistent with measures already part of the action considered in the Biological Opinion and required by the lease issued to Cape Wind.

1. To implement RPM #1, BOEM and Cape Wind must ensure that the Right Whale Sightings Advisory System is monitored by project personnel prior to leaving port each day. Information on right whale sightings is available at: <http://www.nefsc.noaa.gov/psb/surveys/>
2. To implement RPM #1, BOEM and Cape Wind must ensure that a look out is posted on all vessels associated with the project. This lookout must be on watch for whales and be in direct communication with the vessel captain so that if a whale is spotted, speed can be reduced and whales can be avoided.
3. To implement RPM#1, BOEM and Cape Wind must ensure that if whales are sighted, vessel operators comply with all vessel strike avoidance measures outlined in BOEM Notice to Lessees No. 2012-G01, NMFS' regulations for approach and avoidance of right whales (50 CFR §224.103(c)), and NMFS' Northeast Regional Viewing Guidelines.
4. To implement RPM #2, BOEM and Cape Wind must ensure that observers begin monitoring at least 60 minutes prior to soft start of the pile driving. Pile driving must not begin until the zone is clear of all listed whales for at least 60 minutes. Monitoring will continue through the pile driving period and end approximately 60 minutes after pile driving is completed.
5. To implement RPM #3, BOEM and Cape Wind must ensure that observers begin monitoring at least 60 minutes prior to the start of the high resolution geophysical survey. The survey must not begin until the zone is clear of all listed whales for at least 60 minutes. Monitoring will continue through the survey period and end approximately 60 minutes after the survey is completed.
6. To implement RPM#4, BOEM and Cape Wind must ensure that all observations of listed whales are reported to NMFS within 3 days. All reports must be submitted via e-mail (incidental.take@noaa.gov) and must include the following information: (a) date and time of observation; (b) species identification; (c) location of whale and location of observer/lookout documenting the sighting; (d) any notes on the behavior of the animal(s); and, (e) description of project operations at the time of the observation.

7. To implement RPM#4, BOEM and Cape Wind must ensure that any interactions with listed whales, including a ship strike, and/or any observations of injured or dead whales, regardless of whether the injury or death was caused by project operations, must be reported via e-mail to NMFS within 24 hours (incidental.take@noaa.gov) and must include the following information: (a) date and time of observation; (b) species identification; (c) location of whale and location of observer/lookout documenting the sighting; (d) any notes on the behavior of the animal(s) and, (e) description of project operations at the time of the observation. Additionally, any interactions with listed whales or observations of injured or dead whales, must be reported as soon as practicable to NMFS' Northeast Regional Hotline (866-755-6622).

These monitoring and reporting measures and their implementing terms and conditions ensure that if the incidental take of a whale were to occur during any project activity, it will be detected and we will be notified so that consultation can be reinitiated. No other monitoring or reporting requirements are necessary.

Because take of North Atlantic right whales, humpback whales or fin whales is not anticipated, no take authorization for these species is required under the Marine Mammal Protection Act for purposes of this ITS. Although we do not anticipate any take of listed marine mammals, the MMPA Incidental Harassment Authorization issued to Cape Wind for the proposed High Resolution Geophysical Survey (79 *Federal Register* 25835-25844, May 6, 2014) will require CWA to abide by certain mitigation measures to further reduce the risk of taking marine mammals. Those measures include: establishment of an exclusion zone; shut down and delay procedures; soft-start procedures; monitoring of the exclusion zone; and reporting of all observations of marine mammals.

Reasonable and Prudent Measures for Sea Turtles

Reasonable and prudent measures are those measures necessary and appropriate to minimize and monitor incidental take of a listed species. These reasonable and prudent measures are in addition to the mitigation measures proposed by BOEM and agreed to by Cape Wind that will become a part of the proposed action (see Appendix A of the accompanying Biological Opinion). NMFS believes the following reasonable and prudent measures are necessary and appropriate to minimize and monitor impacts of incidental take of sea turtles:

1. BOEM must ensure that any endangered species monitors contracted by Cape Wind are approved by NMFS.
2. During the conduct of pile driving activities related to turbine monopile and Electrical Service Platform (ESP) installation, the 750 meter exclusion zone must be monitored by a NMFS-approved endangered species monitor for at least 60 minutes prior to pile driving.
3. During the conduct of the high resolution geophysical survey, the 500 meter exclusion zone must be monitored by a NMFS-approved endangered species monitor for at least 60 minutes prior to the survey.
4. Acoustic measurement of the first pile being driven must be conducted to confirm the

sound levels modeled by BOEM and reported in the BA.

5. Prior to decommissioning, BOEM must provide to NMFS a complete plan for decommissioning activities.

Terms and conditions to implement RPMs for Sea Turtles

In order to be exempt from prohibitions of section 9 of the ESA, BOEM must comply with the following terms and conditions, which implement the reasonable and prudent measures described above and which outline required minimization and monitoring requirements. These terms and conditions are non-discretionary.

1. To implement RPM #1, BOEM shall provide NMFS with the names and resumes of all endangered species monitors to be employed at the project site at least 30 days prior to the start of construction. No observer shall work at the project site without written approval of NMFS. If during project construction or operations, additional endangered species monitors are necessary, BOEM will provide those names and resumes to NMFS for approval at least 10 days prior to the date that they are expected to start work at the site.
2. To implement RPM #2, observers must begin monitoring at least 60 minutes prior to soft start of the pile driving. Pile driving must not begin until the zone is clear of all sea turtles for at least 60 minutes. Monitoring will continue through the pile driving period and end approximately 60 minutes after pile driving is completed.
3. To implement RPM #2 and #3, adequate lighting must be provided on all vessels used for endangered species observation to ensure that observers can monitor the exclusion zone for listed sea turtles. If sufficient lighting can not be provided, activities must be limited to daylight hours.
4. To implement RPM #3, observers must begin monitoring at least 60 minutes prior to the start of the high resolution geophysical survey. The survey must not begin until the zone is clear of all sea turtles for at least 60 minutes. Monitoring will continue through the survey period and end approximately 60 minutes after the survey is completed.
5. To implement RPM #4, acoustic monitoring must be conducted to verify that sound levels at 3.4km from the pile being driven is less than 160 dB. Results of this monitoring must be reported to NMFS prior to the driving of any subsequent piles.
6. To implement RPM #5, if the project is to be decommissioned, BOEM must provide a complete decommissioning plan and analysis of effects on listed species to NMFS. NMFS would then review the plan to determine if reinitiation of this consultation is necessary.

The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize and monitor the impact of incidental take that might otherwise result from

the proposed action. Specifically, these RPMs and Terms and Conditions will ensure that no listed species are exposed to injurious levels of sound and will verify the modeling results provided by BOEM based on which NMFS has made conclusions regarding take.

RPM and Term and Condition #1 is necessary and appropriate because it is specifically designed to ensure that all endangered species monitors employed by the applicant are qualified to conduct the necessary duties. Including this review of endangered species monitors by NMFS staff is only a minor change because it is not expected to result in any delay to the project and will merely enforce the qualifications of the endangered species monitors that are already required by BOEM.

RPM and Term and Condition #2 as well as RPM#3 and Term and Condition #4 are necessary and appropriate to provide adequate monitoring by extending the time that monitoring of the exclusion zone must occur from the 30 minutes required by BOEM to 60 minutes. The normal duration of sea turtle dives ranges from 5-40 minutes depending on species, with a maximum duration of 45-66 minutes depending on species (Spotila 2004). As sea turtles can stay submerged for longer than 30 minutes, but typically surface at least every 60 minutes, it is reasonable to require that monitoring occur for at least 60 minutes to allow the endangered species monitor to detect any sea turtles that may be submerged in the exclusion zone. Increasing the time to 60 minutes is only a minor change because the observer will be on location already and an additional 30 minutes of observation is not expected to result in any effects to the project schedule. Term and Condition #3 is necessary and appropriate to provide adequate monitoring of the exclusion zone as if lighting is poor the endangered species monitors will not be able to effectively survey the exclusion zone. Requiring adequate lighting is only a minor change because the vessels will already have some lighting and the addition of extra lighting is not expected to be more than a minor cost and not cause any delay of the project. If sufficient lighting can not be provided and activities must be curtailed during the dark, the delay in project schedule will be only a few hours and this is not expected to result in more than a minor cost and minor effect on overall project schedule.

RPM #4 and Term and Condition #5 are necessary and appropriate because they are designed to verify that the sound levels modeled by BOEM are valid and that the 3.4km zone where sound levels are expected to be greater than 160dB is accurate. This RPM and Term and Condition does not cause more than minor changes because Cape Wind is already required by BOEM to conduct monitoring of underwater sound levels associated with the driving of the first three piles. These measurements must be taken at 100m, 500m and 750m in two directions either west, east, south or north of the pile driving site. The addition of one additional monitoring site for one pile driving event will not cause delays to the project or add a significant cost. RPM #5 and Term and Condition #6 is necessary and appropriate as way to help monitor the proposed action and incidental take by ensuring that the effects of any decommissioning activities on listed species have been adequately analyzed. As it is impossible to predict the exact decommissioning scenario and the status of listed species at the time of decommissioning it is necessary to review the decommissioning plan when it is developed.

These RPMs and Terms and Conditions in conjunction with the mitigation measures proposed by BOEM and agreed to by Cape Wind that will become a part of the proposed action will serve to

minimize and monitor incidental take of listed species.

CONSERVATION RECOMMENDATIONS

Section 7(a)(1) of the ESA directs Federal agencies to utilize their authorities to further the purposes of the ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information. NMFS has determined that the proposed action is not likely to jeopardize the continued existence of any listed species. To further reduce the adverse effects of the proposed actions, NMFS recommends that BOEM work with the applicant, Cape Wind Associates, to implement the following conservation recommendations.

1. To the extent practicable, pile driving should be minimized during the June – October timeframe when sea turtles are expected to occur in the action area.
2. As there is limited data on use of Nantucket Sound by listed sea turtles, BOEM and/or Cape Wind should support additional survey effort. This could include aerial surveys of the action area specifically targeting sea turtles.

REINITIATION OF CONSULTATION

This concludes formal consultation with BOEM, ACOE and EPA regarding the proposed construction, operation and future decommissioning by Cape Wind Associates LLC of a wind energy project on Horseshoe Shoal. As provided in 50 CFR 402.16, reinitiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) a new species is listed or critical habitat designated that may be affected by the action; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
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MAY 21 2014

Michelle Morin
Chief, Environment Branch for Renewable Energy
Environmental Division
Bureau of Ocean Energy Management
381 Elden Street
Mail Stop 1328
Herndon, VA 20170

Re: ESA Consultation for Cape Wind

Dear Ms. Morin,

Enclosed is an amended Incidental Take Statement (ITS) for the biological opinion (Opinion), issued by us on December 30, 2010, under Section 7(a)(2) of the Endangered Species Act (ESA), to the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM) regarding the proposed construction, operation and future decommissioning by Cape Wind Associates, LLC of a wind energy project on Horseshoe Shoal in federal waters of Nantucket Sound, Massachusetts. While BOEM is the lead Federal agency for the section 7 consultation, the U.S. Army Corps of Engineers, Environmental Protection Agency and the Department of Energy also have a role in authorizing or funding the action. We will be sending a copy of this letter and amended ITS to those agencies as well.


The amended ITS is being issued in response to the decision by the Federal district court in Public Employees for Environmental Responsibility et al., v. Beaudreau et al., 1:10-cv-01067-RBW (D.D.C., March 14, 2014). The amended ITS adds a new section entitled "ESA Listed Marine Mammals." It indicates that we do not anticipate any incidental take of North Atlantic right whales, fin whales and humpback whales and that the amount or extent of incidental take is set at zero. If there is any incidental take of North Atlantic right whales, humpback whales or fin whales, we will consider the specified amount or extent of incidental take to be exceeded, and, pursuant to 50 CFR §402.14(h)(4) and 50 CFR §402.16(a), consultation must be reinitiated immediately. The amended ITS includes Reasonable and Prudent Measures and implementing Terms and Conditions necessary and appropriate for monitoring and reporting any incidental take of listed whales. These measures are consistent with monitoring and reporting requirements included as part of the proposed action we analyzed in the 2010 Opinion and the measures required by the lease you issued to Cape Wind on November 1, 2010. As required in those documents, any interactions with ESA listed whales must be reported to NMFS within 24 hours.



The amended ITS still includes the measures required to minimize, monitor, and report any take of sea turtles.

We look forward to continuing to work cooperatively with your office to minimize the effects of energy projects on listed species in the northeast region. For further information regarding any consultation requirements, please contact Julie Crocker at (978)282-8480 or by e-mail (Julie.Crocker@noaa.gov). Thank you for working cooperatively with my staff throughout this consultation process.

Sincerely,


for John K. Bullard
Regional Administrator

cc: Lewandowski- BOEM
McDonnell – EPA R1
Adams – ACOE
McMillan – DOE

File Code: Section 7 MMS/BOEM Cape Wind Nantucket
PCTS: NER-2010-3866

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY, et al.,

Plaintiffs,

v.

WALTER CRUICKSHANK,¹ et al.,

Defendants, and

CAPE WIND ASSOCIATES, LLC,

Intervenor.

Civil No. 10-cv-01067-RBW-DAR

consolidated with
No. 10-cv-01079-RBW
No. 10-cv-01073-RBW
No. 11-cv-01238-RBW

ALLIANCE TO PROTECT NANTUCKET
SOUND, et al.,

Plaintiffs,

v.

S.M.R. JEWELL, et al.,

Defendants, and

CAPE WIND ASSOCIATES, LLC,

Intervenor.

**FEDERAL DEFENDANTS'
NOTICE OF COMPLETION OF
REMANDS**

TOWN OF BARNSTABLE, MASSACHUSETTS,

Plaintiff,

v.

S.M.R. JEWELL, et al.,

Defendants, and

CAPE WIND ASSOCIATES, LLC,

Intervenor.

¹ Walter Cruickshank, Acting Director of the Bureau of Ocean Energy Management, is substituted for his predecessor, Tommy Beaudreau, pursuant to Federal Rule 25(d).

THE WAMPANOAG TRIBE OF GAY HEAD
(AQUINNAH)

Plaintiff,

v.

WALTER CRUICKSHANK, et al.,

Defendants, and

CAPE WIND ASSOCIATES, LLC,

Intervenor.

Federal Defendants hereby provide notice that the U.S. Fish & Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) have completed their respective remands in response to the Court’s March 14, 2014 Order and Memorandum Opinion (ECF Nos. 370 & 371), which remanded a reasonable and prudent measure included in an incidental take statement in FWS’ biological opinion and an incidental take statement included in NMFS’ biological opinion with respect to right whales. Copies of FWS’ and NMFS’ remand documents are attached hereto, along with letters of receipt from the Bureau of Ocean Energy Management (“BOEM”).

With the completion of the aforementioned remands, all claims of all parties have been resolved, and entry of final judgment pursuant to Federal Rule of Civil Procedure 58(a) is warranted.

DATED: July 2, 2014

Respectfully Submitted,

SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Resources Division

SETH M. BARSKY, Section Chief
KRISTEN L. GUSTAFSON, Assistant Chief

/s/ Robert P. Williams
ROBERT P. WILLIAMS,
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Wildlife & Marine Resources Section
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JAMES D. GETTE
Acting Chief, Natural Resources Section
Environment and Natural Resources Division

/s/ Luther L. Hajek
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/s/ Reuben Schiffman
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Attorneys for Federal Defendant

Schena, Cristeen

From: Stein, Mark
Sent: Thursday, July 10, 2014 3:55 PM
To: Williams, Robert P. (ENRD)
Subject: RE: Cape Wind Remand

Rob - Thanks for sending these along!

Mark A. Stein
Senior Assistant Regional Counsel
U.S. EPA - Region 1
5 Post Office Square, Suite 100
Mail Code ORA-18-1
Boston, MA 02109-3912

Tel. (617) 918-1077
E-Fax: (617) 918-0077
email: stein.mark@epa.gov

From: Williams, Robert P. (ENRD) [<mailto:Robert.P.Williams@usdoj.gov>]
Sent: Thursday, July 10, 2014 1:12 PM
To: Stein, Mark
Subject: Cape Wind Remand

Mark, as discussed here are the remand documents, including the letters from BOEM to NMFS and FWS. Let me know if you have any questions. Thanks.

Rob

Robert P. Williams, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
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Schena, Cristeen

From: Williams, Robert P. (ENRD) <Robert.P.Williams@usdoj.gov>
Sent: Thursday, July 10, 2014 1:12 PM
To: Stein, Mark
Subject: Cape Wind Remand
Attachments: DN 390-1_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-2_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-3_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-4_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-5_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-6_FDs' Notice_of_Completion_of_Remand.pdf; DN 390-7_FDs' Notice_of_Completion_of_Remand.pdf; DN 390_FDs' Notice_of_Completion_of_Remand.pdf

Mark, as discussed here are the remand documents, including the letters from BOEM to NMFS and FWS. Let me know if you have any questions. Thanks.


Rob

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From: ESS Group, Inc. <jamie@essgroup.ccsend.com> on behalf of ESS Group, Inc. <news@essgroup.com>
Sent: Friday, June 20, 2014 11:51 AM
To: Spalding, Curt
Subject: Regulatory News: Clean Water Act, BOEM Leasing & More


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Reminders!

MCP REVISIONS TAKE EFFECT 6/20
[Learn more](#) about the Massachusetts Contingency Plan changes.

MASSDEP WETLANDS, WATERWAYS, AND WATER QUALITY CERTIFICATION




MassDEP's revised Wetlands, Waterways, and Water Quality Certificate regulations have yet to be released, but are expected. Stay tuned to ESS for impending changes!

You can read more about the proposed changes [here](#).

EPA's Public Comment Period for "Waters of the U.S." Extended to 10/20

On April 21, 2014, the United States Environmental Protection Agency and the U.S. Army Corps of Engineers jointly released a new [proposed rule](#) that amends the definition of "waters of the U.S." to increase Clean Water Act transparency and predictability.



The proposed rule expands federal jurisdiction to the following bodies of water:

- All waters used, or previously used, in interstate or foreign commerce
- The territorial seas
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary
- On a case-by-case basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands located in the same region, have a significant nexus to a traditional navigable water

The public comment period for the proposed rule has now been extended to **October 20, 2014**.

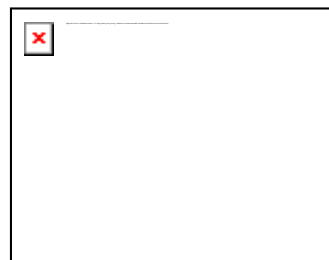
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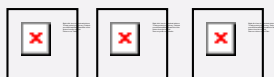
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BOEM Announces Leasing of Nation's Largest Offshore Wind Energy Area off Massachusetts

The Bureau of Ocean Energy Management (BOEM) announced on June 18, 2014 that more than 742,000 acres off the coast of Massachusetts will be available for commercial wind energy leasing, making this the largest offshore wind energy lease area in the nation.



STAY CONNECTED



The proposed [Wind Energy Area](#), which is set to be released as four separate leases, is located approximately 12 miles offshore from the northern boundary of Massachusetts and covers an area 33 miles long and 47 miles wide.

BOEM has previously awarded five commercial wind energy leases off the Atlantic coast, including the [Cape Wind Project](#) in Nantucket Sound, Massachusetts. BOEM is expected to hold additional auctions for Wind Energy Areas offshore Maryland and New Jersey later this year.

Comments on the proposed lease area, as well as applications to participate in the auction, are due on August 18, 2014. Public comments may be submitted at www.regulations.gov under Docket No. BOEM-2014-0034.

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